

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRENDA DIANNE WARE,

Petitioner Below, Appellee,

vs.

Appeal No. 34720

DAVID GARY WARE,

Respondent Below, Appellant

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From the Circuit Court of  
Harrison County, West Virginia  
(Judge James A. Matish)  
Circuit Number 05-D-351-4

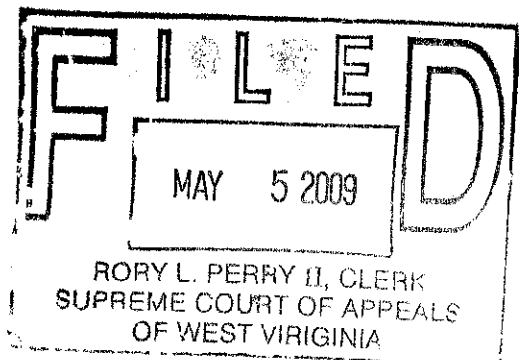
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**APPELLANT'S BRIEF**

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Counsel for Appellant:

Douglas A. Cornelius  
P.O. Box 4424  
Clarksburg, WV 26302-4424  
304-622-3100  
WVSB# 831



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**APPELLANT'S BRIEF**

To The Honorable Justices of the  
Supreme Court of Appeals of West Virginia

Appellant David Gary Ware has been aggrieved by the Order of the Circuit Court of Harrison County (James A. Matish), which was entered herein on April 9, 2008, in regard to Judge Matish's ruling that the subject Ante-Nuptial Agreement between the parties only protects Petitioner's 49% interest in the subject pizza business which he owned prior to the parties' marriage, but does not protect the 51% interest therein which he acquired during the marriage. Unless this Court holds that the subject Ante-Nuptial Agreement fully protects Mr. Ware's interests therein, he is further aggrieved by the Family Court's valuation of the 51% interest, which valuation was affirmed by the Circuit Court.

1. KIND OF PROCEEDING AND NATURE OF RULING IN CIRCUIT COURT

The proceeding below was a divorce action which involved all of the usual issues, specifically including the equitable distribution of marital property and debts. This case generated three appeals from Family Court to Circuit Court and two remands from Circuit Court to Family Court. The primary and threshold issue involves the validity and enforceability of an "Ante-Nuptial Agreement" which was entered into by the parties on February 11, 1993 prior to their marriage on February 20, 1993. The specific item of property involved is a business known as the "Pizza Place of Bridgeport, Inc."

The Family Court Judge (Jaymie Godwin Wilfong) initially held that the subject "Ante-Nuptial Agreement" is "set aside as void and invalid." A hearing on the validity and enforceability of the subject "Ante-Nuptial Agreement" was conducted by the Family Court on December 16, 2005, and an Order was entered on January 31, 2006, which Order was incorporated by reference in the Decree Of Divorce entered on October 24, 2006. On November 22, 2006, Respondent below (David Gary Ware) filed a "Petition For Appeal From Family Court Final Order" and on December 4, 2006, Petitioner below (Brenda Dianne Ware) filed a Cross-Petition For Appeal. The Circuit Court of Harrison County (Judge James A. Matish) conducted a hearing on January 4, 2007, and subsequently entered an "Order Granting Petition For Appeal And Cross-Petition And Reversing And Remanding Case To Family Court" on March 22, 2007. In Circuit Court Judge Matish's said Order, it was found and held that the Family Court Judge abused her discretion in ruling as a matter of law that

the subject Ante-Nuptial Agreement was invalid due to Attorney Keith Skeen's representation of both parties (Mr. Skeen was a patron of the subject pizza business who drafted the subject Ante-Nuptial Agreement). The Circuit Court also found and held that the Family Court's finding that Brenda Ware was denied an opportunity to consult with independent counsel was clearly erroneous. The Circuit Court also found and held that the Family Court abused her discretion in holding as a matter of law that the subject Ante-Nuptial Agreement is invalid due to the lack of financial disclosure between the parties at the time of the execution of said Agreement. In light of the Circuit Court's ruling that the subject "Ante-Nuptial Agreement" is valid, the issue was remanded to the Family Court to determine, upon examining the language employed in the subject Ante-Nuptial Agreement, the disposition of the assets addressed in the Agreement, including whether or not the 51% interest in the Pizza Place of Bridgeport, which was acquired by David Ware during the marriage, is protected under the agreement, and whether or not Brenda Ware is entitled to any increase that may have occurred during the marriage in the 49% interest that David Ware owned in said business prior to the marriage.

Pursuant to said first remand, the Family Court conducted a hearing on April 18, 2007, and entered an "Order On Issues Remanded By Circuit Court" on July 3, 2007. In said Order, the Family Court found and held that pursuant to the specific provisions of the Ante-Nuptial Agreement, Brenda Ware waived, released and relinquished all rights to which she might have been entitled by reason of marriage in and to David Ware's interest in the Pizza Place

of Bridgeport business, including the 49% interest he already owned and the 51% interest he subsequently acquired. Based upon the findings and conclusions specified in said July 3, 2007 Order, the Family Court held that Brenda Ware is not entitled to any of the value of the Pizza Place of Bridgeport, and her request for a portion of said value was denied.

Brenda Ware then filed a Petition For Appeal with the Circuit Court of Harrison County (Judge James A. Matish) (second appeal). Following a hearing on September 5, 2007, the Circuit Court on October 10, 2007, entered an "Order Granting Petition For Appeal, And Reversing And Remanding Case To Family Court (second remand) whereby it was found that the Family Court abused her discretion in finding as a matter of law that the subject Ante-Nuptial Agreement applied to the 51% interest that David Ware acquired in the subject pizza business after marriage, and the Family Court was directed on remand to determine the appropriate value and disposition of said 51% interest.

On December 7, 2007, the Family Court conducted its second remand hearing and on December 19, 2007, entered an "Order On Issues Remanded By Circuit Court October 10, 2007" wherein the sum of \$184,747.50 was determined to be the value of the 51% interest in the subject pizza business and it was held that Brenda Ware was entitled to a judgment for one-half of said value, being \$92,373.75.

David Ware then filed a Petition For Appeal from said Order (third appeal) and Brenda Ware filed a Cross Petition For Appeal. Harrison County

Circuit Judge James A. Matish conducted a hearing on March 17, 2008, and entered a Final Order on April 9, 2008 affirming the Family Court's Order and denying both the Petition For Appeal and the Cross Petition.

Appellant David Gary Ware seeks this Court's reversal of the Final Order and a finding that the subject Ante-Nuptial Agreement protected all of his interests in said pizza business and precludes Brenda Dianne Ware from any entitlement to any of the value thereof.

A second issue in this appeal is only asserted if the threshold issue is not decided in favor of David Gary Ware. Said second issue relates to an improper valuation of the 51% interest in the subject pizza business, which issue is moot if the subject Ante-Nuptial Agreement is found to fully protect David Ware's interests in said pizza business, whether he acquired them before or after his marriage to Brenda Ware.

## II. STATEMENT OF FACTS

The parties entered into an "Ante-Nuptial Agreement" dated February 11, 1993, prior to their marriage on February 20, 1993. In paragraph 2 on page 3 of said Agreement, Brenda Dianne Ayers released "all rights that she could or might have, by reason of marriage, in the Pizza Place franchise located at Meadowbrook Mall, Bridgeport, Harrison County, West Virginia as well as any future acquisitions of Pizza Place franchises." Although the word "franchise" was used by the attorney who prepared said Agreement, there actually was not any "franchise" as such, but the Family Court correctly found and concluded in paragraph 4 on page 2 of the "Order Regarding Antenuptial Agreement" that

the parties were aware of what was the subject matter of paragraph 2 of said Agreement, being The Pizza Place of Bridgeport business entity, which was actually a corporation.

This Court is urged to review the CD and/or the transcript of the December 16, 2005 hearing regarding the subject Ante-Nuptial Agreement, and consider the sworn testimony adduced at said hearing from each of the parties and from Keith Skeen, the attorney who prepared said Agreement. It is respectfully submitted that the overall evidence adduced at said hearing supports a finding that said Agreement is valid and is binding on the parties. It appears from said testimony that Attorney Keith Skeen was a customer of The Pizza Place of Bridgeport, which was and is located in the Food Court of the Meadowbrook Mall and that Mr. Skeen was acquainted with both parties only through his being such a customer at the Pizza Place and at a candy store at said Mall named "Sweets & Treats", which store Ms. Ayers managed for a relatively short time period prior to the parties' marriage. It appears that the parties lived together for approximately 1-1/2 years prior to their marriage, and once they decided to get married, David Ware wanted to protect himself and his co-owner (John Geraffo - 51% ownership interest) from any rights which Brenda Ayers could claim regarding the subject Pizza Place business. Mr. Ware, therefore, initially asked Mr. Skeen at said Mall to prepare a proposed Ante-Nuptial Agreement to protect said Pizza Place business from any claims or rights which Ms. Ayers could assert by virtue of the parties' contemplated marriage. It further appears that Mr. Ware also proposed that a mutual waiver

of alimony provision be included in said Agreement. This initial discussion apparently took place approximately two months before the parties' marriage.

It further appears from the testimony of the parties and Mr. Skeen that the three of them met at some place (probably at the Mall) to review and to discuss the proposed agreement (initial draft thereof), that the only change thereto requested by Ms. Ayers was the deletion of the provision regarding the mutual waiver of alimony, and that Mr. Ware agreed to delete said provision.

After said Agreement was re-drafted by Mr. Skeen, it appears that both parties went to Mr. Skeen's office, read the re-drafted Agreement, and signed and acknowledged it. The evidence is clear that Ms. Ayers did not at any time during the review and discussion of or during the signing of said Agreement make a request to consult with another attorney before signing said Agreement, and it is also clear that she had an opportunity to consult with another attorney at any time from the time the initial discussions began regarding a proposed Ante-Nuptial Agreement to the time said Agreement was executed and acknowledged.

The only concern of Mr. Ware was to protect the Pizza Place business owned by himself (49%) and by John Geraffo (51%) from any claims or rights which could have been asserted by Ms. Ayers as a result of the parties' marriage. No other issue was raised in this divorce action regarding marital property rights, and all other items of marital property have been agreed upon and equitably distributed between the parties in accordance with their agreement.



The West Virginia Supreme Court Of Appeals in Gant v. Gant, 329 S.E.2d 106 (W.Va. 1985) held as follows:

Syllabus by the Court No. 1:

“Prenuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid in West Virginia; the burden of proving the invalidity of such an agreement is upon the person who would have the agreement held invalid.”

Syllabus by the Court No. 2:

“The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel.”

The Court in Gant found and held that the subject prenuptial agreement was valid and enforceable. The Court further held that general contract law governs prenuptial agreements and that “nowhere in the law of contracts is it required that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable.” (Gant, at p. 112). The Court further held that : “The institution of marriage still confers substantial benefits on both the couple involved and society as a whole, however. Therefore the legal system must continue to encourage marriage even if that means honoring prenuptial agreements that are not to judges’ personal liking.” (Gant, at p. 113).

It is respectfully submitted that the fact that Mr. Skeen advised both parties regarding his and her property rights and of the legal significance of the proposed Ante-Nuptial Agreement does not invalidate or void it. Mr. Skeen certified on pages 10 and 11 of said Agreement that he consulted with each party, fully advised each party of his and her property rights and of the legal significance of said Agreement, that each party acknowledged a full and complete understanding of the legal consequences of the terms and provisions of said Agreement, and that each party freely and voluntarily executed said Agreement in his presence.

While it has been argued that Mr. Skeen should not have consulted with and advised both parties regarding said pre-marital contract, Mr. Skeen represented that he was not aware of any conflict at the time the parties signed said contract, which he felt was not a violation of the Rules Of Professional Conduct, as opposed to consulting with and advising both parties to a divorce action, which is not permitted under said RPC. Mr. Skeen further testified that Ms. Ayers never requested independent counsel for herself although he recalls advising each of them "early on" that each of them had the right to seek and secure separate counsel. Many attorneys routinely prepare legal contracts between parties (land contracts, deeds, buy/sell agreements, etc.) when the parties do not each have independent counsel, but if and when a conflict develops between said parties to a contract, it is inappropriate at that point for one attorney to consult with, advise and/or represent both parties or perhaps either party.

The Family Court correctly found and concluded that the burden of proof is upon Brenda Ware to show that the subject Agreement is void or voidable, but said Family Court's finding and/or conclusion that she met her burden of proof was clearly erroneous and constituted an abuse of discretion. The Family Court's findings that Brenda Ayers did not have access to independent counsel, nor did she have an opportunity to consult independent counsel are clearly erroneous, since the evidence from both parties and from Mr. Skeen supports a finding that Brenda Ayers did in fact have several opportunities to consult with independent counsel, during the initial discussions regarding said proposed Agreement, during a review of the initial draft thereof, and during a review of the final Agreement. According to Mr. Skeen's uncontroverted testimony, Brenda Ayers never requested that she be able to discuss the proposed Agreement with another attorney or take a copy of the proposed Agreement to another attorney, and Mr. Skeen testified that if such a request had been made by her, he most certainly would have honored it.

The other stated basis for the Family Court's decision on this issue is that there was not a complete disclosure of the value of the parties' respective assets and debts. As previously stated, all marital assets and debts have been equitably distributed by the parties pursuant to their agreement as to marital assets and the values thereof and as to marital debts and the amounts thereof. The only property matter in issue is the marital value of The Pizza Place of Bridgeport business. As also previously stated, the specific reason for and purpose of the Ante-Nuptial Agreement was to protect the interest of David

Ware and John Geraffo in said pizza business from any claims or rights of Brenda Ayers as a result of marrying David Ware. It is clear that Brenda Ayers had the education and intelligence to be able to read and understand the terms and provisions of said Agreement. She was approximately 22 years of age at the time she discussed, reviewed and signed said Agreement, she had a high school diploma and had graduated from a 2-year technical school, and she could read and understand the English language. As stated in Gant in Syllabus by the Court point 2., "independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel."

After this Court's review of the CD and/or the transcript of the December 16, 2005 hearing, the subject Ante-Nuptial Agreement, the Gant decision, and the Order Regarding Antenuptial Agreement, it is respectfully submitted that the Ante-Nuptial Agreement dated February 11, 1993 is valid and is enforceable as to all interests in the subject pizza business.

### III. ASSIGNMENTS OF ERROR

1. The Circuit Court (Judge Matish) erred in reversing the Family Court's findings and conclusions contained in its July 3, 2007 "Order On Issues Remanded By Circuit Court" (first remand) that Brenda Ware is not entitled to any portion of the value of the Pizza Place of Bridgeport business in that she waived, released and relinquished any rights therein pursuant to the specific provisions of the subject Ante-Nuptial Agreement.

2. If and only if the above-stated threshold issue is not decided in favor of David Gary Ware, a second issue is asserted that the Circuit Court (Judge Matish) erred in affirming the Family Court's findings and conclusions in its December 19, 2007 "Order On Issues Remanded By Circuit Court October 10, 2007" (second remand) that Brenda Ware is entitled to the sum of \$92,373.75 for one-half of the value of the 51% interest which David Ware acquired in the subject pizza business during the parties' marriage. The Family Court (Judge Wilfong) erred in her findings, conclusions and decision regarding the value of a 51% interest in the Pizza Place of Bridgeport, Inc., which she determined to be \$184,747.50, and of which she found that Brenda Ware is entitled to one-half of that amount, being \$92,373.75.

#### IV. AUTHORITIES, ARGUMENTS AND REQUESTED RELIEF

A. Regarding the first assignment of error, which concerns the subject Ante-Nuptial Agreement:

In paragraph 2 on page 3 of the parties' Ante-Nuptial Agreement, Brenda Dianne Ayers released "all rights that she could or might have, by reason of marriage, in the Pizza Place franchise located at Meadowbrook Mall, Bridgeport, Harrison County, West Virginia as well as any future acquisitions of Pizza Place franchises." Although the word "franchise" was used by the attorney who prepared said Agreement, there actually was not any "franchise" as such, but the Family Court correctly found and concluded in paragraph 4 on page 2 of the "Order Regarding Antenuptial Agreement" that the parties were aware of what was the subject matter of paragraph 2 of said Agreement,

being The Pizza Place of Bridgeport business entity, which was actually a corporation.

This Court is urged to review the CD and/or the transcript of the December 16, 2005 hearing regarding the subject Ante-Nuptial Agreement, and consider the sworn testimony adduced at said hearing from each of the parties and from Keith Skeen, the attorney who prepared said Agreement. It is respectfully submitted that the overall evidence adduced at said hearing supports a finding that said Agreement is valid and is binding on the parties. It appears from said testimony that Attorney Keith Skeen was a customer of The Pizza Place of Bridgeport, which was and is located in the Food Court of the Meadowbrook Mall and that Mr. Skeen was acquainted with both parties only through his being such a customer at the Pizza Place and at a candy store at said Mall named "Sweets & Treats", which store Ms. Ayers managed for a relatively short time period prior to the parties' marriage. It appears that the parties lived together for approximately 1-1/2 years prior to their marriage, and once they decided to get married, David Ware wanted to protect himself and his co-owner (John Geraffo - 51% ownership interest) from any rights which Brenda Ayers could claim regarding the subject Pizza Place business. Mr. Ware, therefore, initially asked Mr. Skeen at said Mall to prepare a proposed Ante-Nuptial Agreement to protect said Pizza Place business from any claims or rights which Ms. Ayers could assert by virtue of the parties' contemplated marriage. It further appears that Mr. Ware also proposed that a mutual waiver

of alimony provision be included in said Agreement. This initial discussion apparently took place approximately two months before the parties' marriage.

It further appears from the testimony of the parties and Mr. Skeen that the three of them met at some place (probably at the Mall) to review and to discuss the proposed agreement (initial draft thereof), that the only change thereto requested by Ms. Ayers was the deletion of the provision regarding the mutual waiver of alimony, and that Mr. Ware agreed to delete said provision.

After said Agreement was re-drafted by Mr. Skeen, it appears that both parties went to Mr. Skeen's office, read the re-drafted Agreement, and signed and acknowledged it. The evidence is clear that Ms. Ayers did not at any time during the review and discussion of or during the signing of said Agreement make a request to consult with another attorney before signing said Agreement, and it is also clear that she had an opportunity to consult with another attorney at any time from the time the initial discussions began regarding a proposed Ante-Nuptial Agreement to the time said Agreement was executed and acknowledged.

The only concern of Mr. Ware was to protect the Pizza Place business owned by himself (49%) and by John Geraffo (51%) from any claims or rights which could have been asserted by Ms. Ayers as a result of the parties' marriage. No other issue was raised in this divorce action regarding marital property rights, and all other items of marital property have been agreed upon and equitably distributed between the parties in accordance with their agreement.

The West Virginia Supreme Court Of Appeals in Gant v. Gant, 329 S.E.2d 106 (W.Va. 1985) held as follows:

Syllabus by the Court No. 1:

"Prenuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid in West Virginia; the burden of proving the invalidity of such an agreement is upon the person who would have the agreement held invalid."

Syllabus by the Court No. 2:

"The validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstances free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel."

The Court in Gant found and held that the subject prenuptial agreement was valid and enforceable. The Court further held that general contract law governs prenuptial agreements and that "nowhere in the law of contracts is it required that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable." (Gant, at p. 112). The Court further held that : "The institution of marriage still confers substantial benefits on both the couple involved and society as a whole, however. Therefore the legal system must continue to encourage marriage even if that means honoring prenuptial agreements that are not to judges' personal liking." (Gant, at p. 113).



It is respectfully submitted that the fact that Mr. Skeen advised both parties regarding his and her property rights and of the legal significance of the proposed Ante-Nuptial Agreement does not invalidate or void it. Mr. Skeen certified on pages 10 and 11 of said Agreement that he consulted with each party, fully advised each party of his and her property rights and of the legal significance of said Agreement, that each party acknowledged a full and complete understanding of the legal consequences of the terms and provisions of said Agreement, and that each party freely and voluntarily executed said Agreement in his presence.

While it has been argued that Mr. Skeen should not have consulted with and advised both parties regarding said pre-marital contract, Mr. Skeen represented that he was not aware of any conflict at the time the parties signed said contract, which he felt was not a violation of the Rules Of Professional Conduct, as opposed to consulting with and advising both parties to a divorce action, which is not permitted under said RPC. Mr. Skeen further testified that Ms. Ayers never requested independent counsel for herself although he recalls advising each of them "early on" that each of them had the right to seek and secure separate counsel. Many attorneys routinely prepare legal contracts between parties (land contracts, deeds, buy/sell agreements, etc.) when the parties do not each have independent counsel, but if and when a conflict develops between said parties to a contract, it is inappropriate at that point for one attorney to consult with, advise and/or represent both parties or perhaps either party.

The Family Court correctly found and concluded that the burden of proof is upon Brenda Ware to show that the subject Agreement is void or voidable, but said Family Court's finding and/or conclusion that she met her burden of proof was clearly erroneous and constituted an abuse of discretion. The Family Court's findings that Brenda Ayers did not have access to independent counsel, nor did she have an opportunity to consult independent counsel are clearly erroneous, since the evidence from both parties and from Mr. Skeen supports a finding that Brenda Ayers did in fact have several opportunities to consult with independent counsel, during the initial discussions regarding said proposed Agreement, during a review of the initial draft thereof, and during a review of the final Agreement. According to Mr. Skeen's uncontroverted testimony, Brenda Ayers never requested that she be able to discuss the proposed Agreement with another attorney or take a copy of the proposed Agreement to another attorney, and Mr. Skeen testified that if such a request had been made by her, he most certainly would have honored it.

The other stated basis for the Family Court's decision on this issue is that there was not a complete disclosure of the value of the parties' respective assets and debts. As previously stated, all marital assets and debts have been equitably distributed by the parties pursuant to their agreement as to marital assets and the values thereof and as to marital debts and the amounts thereof. The only property matter in issue is the marital value of The Pizza Place of Bridgeport business. As also previously stated, the specific reason for and purpose of the Ante-Nuptial Agreement was to protect the interest of David

Ware and John Geraffo in said pizza business from any claims or rights of Brenda Ayers as a result of marrying David Ware. It is clear that Brenda Ayers had the education and intelligence to be able to read and understand the terms and provisions of said Agreement. She was approximately 22 years of age at the time she discussed, reviewed and signed said Agreement, she had a high school diploma and had graduated from a 2-year technical school, and she could read and understand the English language. As stated in Gant in Syllabus by the Court point 2., "independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel."

After this Court's review of the CD and/or the transcript of the December 16, 2005 hearing, the subject Ante-Nuptial Agreement, the Gant decision, and the Order Regarding Antenuptial Agreement, it is respectfully submitted that the Ante-Nuptial Agreement dated February 11, 1993 is valid and is enforceable as to all interests in the subject pizza business.

The Circuit Court in its "Order Granting Petition For Appeal And Cross Petition, And Reversing And Remanding Case To Family Court" entered herein on March 22, 2007, found and held that the subject Antenuptial Agreement was valid and enforceable for the reasons stated therein and based upon the legal authorities cited therein. In that March 22, 2007 Order, the Circuit Court on page 7 thereof, remanded the subject issue to the Family Court "so that it may make a determination, upon examining the language employed in the

Antenuptial Agreement, as to the disposition of the assets addressed in the Agreement. This includes whether or not the 51% interest in the Pizza Place of Bridgeport, which was acquired during the marriage by Mr. Ware, is protected under the Agreement and whether or not Ms. Ware is entitled to any increase that may have occurred during the marriage in the 49% interest that Mr. Ware owned in the business prior to the marriage." In footnote 2 at the bottom of page 7, it is stated that "the Court directs Judge Wilfong's attention to paragraph no. 2 on page 3, as well as paragraph nos. 4 and 6 on page 4."

In its "Order On Issues Remanded By Circuit Court" entered on July 3, 2007, the Family Court (Judge Wilfong) found and held in paragraphs numbered 2, 3 and 4 on pages 2 and 3 thereof as follows:

"2. The specific language of said Ante-Nuptial Agreement supports a finding and conclusion that Petitioner Brenda Dianne Ware (formerly Brenda Dianne Ayers) waived, released and relinquished any and all rights which she could or might have, by reason of marriage, in and to the Pizza Place of Bridgeport business located at the Meadowbrook Mall in Bridgeport, West Virginia. The Family Court in paragraph 4 on page 2 of its "Order Regarding Antenuptial Agreement", specifically found that although paragraph 2 of said Ante-Nuptial Agreement used the word "franchise" and that there was no "franchise", "the parties were aware of what was the subject matter in that paragraph." At the conclusion of the December 16, 2005 hearing, the Family Court stated: "In fact, there was no franchise. But the Court finds that there was a meeting of the minds. Everybody knew what the parties were talking

about.” Circuit Judge Matish also specifically found in the second paragraph on page 6 of his Order that “Ms. Ware knew that Mr. Ware’s major asset was his interest in a business known as the Pizza Place of Bridgeport and that the only reason for the Antenuptial Agreement was to protect Mr. Ware’s interest in that very business.”

“3. In addition to directing the Family Court to the specific language contained in paragraph 2 on page 3 of the subject Ante-Nuptial Agreement, Circuit Judge Matish further directed the Family Court’s attention to paragraph numbers 4 and 6 on page 4 thereof. Paragraph number 4 clearly and specifically provides that each party “shall respectively own all personal property which each respectively now owns or may hereafter acquire free from any claim on the part of the other spouse . . . (emphasis supplied)”. Paragraph number 6 clearly and specifically provides that each party releases “all rights, which, by reason of their marriage, each may acquire in the property or estate of the other.”

“4. In view of the validity of the subject Ante-Nuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Dianne Ayers (now Brenda Dianne Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware’s interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest he subsequently acquired from John Geraffo.”

On page 5 of said Order, the Family Court held and ordered that "Based upon the findings and conclusions contained in paragraph A. on pages 1-3 hereof, Petitioner is not entitled to any of the value of the Pizza Place Of Bridgeport business entity, and her request for a portion of said value is denied."

In the Circuit Court's "Order Granting Petition For Appeal, And Reversing And Remanding Case To Family Court" entered herein on October 10, 2007, the Circuit Court upheld the Family Court's holding as to the pre-marital 49% interest and any increase in the value thereof, but reversed the Family Court's holding as to the 51% interest acquired during the parties' marriage.

With all due respect to the Circuit Court, David Ware disagrees with said Court's holding that the 51% interest is not protected by the Antenuptial Agreement, and he requests that this Court find and hold that the subject Antenuptial Agreement is valid and enforceable as to all of his interests in the Pizza Place of Bridgeport business, and that in view of the validity of the subject Antenuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Dianne Ayers (now Brenda Dianne Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware's interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest he subsequently acquired from John Geraffo.

B. Regarding the second assignment of error, which concerns the valuation of the 51% interest in the subject pizza business which David Ware

acquired from John Geraffo after his marriage to Brenda Ware (this assignment of error is only made if the first assignment of error is not decided in favor of David Ware regarding the protection afforded to him by the subject Ante-Nuptial Agreement):

Judge Wilfong ignored the comments and direction of this Court (Honorable James A. Matish) which were expressed during the September 5, 2007 hearing and which comments and direction were supplied to her in a partial transcript of said hearing, during which Judge Matish stated that "a 51% value in a business is probably not worth 51% of the whole, but is probably worth something less because of the difference in ownership that would be created. If someone was buying out 51% of a business they probably wouldn't be willing to pay as much as what they would for 51% if they were buying the whole business, and that the Family Court Judge would take some testimony on what that value was of the 51%."

Judge Wilfong ignored the testimony and written report of David Ware's expert witness, Mickey G. Petitto, WVCGA License #065, of Professional Consultants – Appraisal Division, which testimony and report contained very specific reasons why an undivided fractional interest of 1% up to 99% lacks the unilateral control associated with a 100% fee simple interest and is considered to be a minority interest, to which a fragmented interest discount of 20% should be applied to the value of a 100% fee simple interest. The 20% discount reflects an adjustment for relative lack of control and for relative lack of marketability. Ms. Petitto's testimony and written report are supported by the

various written authorities cited by her in footnotes 1 through 6 on page 5 of her report. Ms. Petitto's written report was placed in evidence at the December 7, 2007 hearing before Judge Wilfong, being identified as "Respondent's Exhibit A."

Judge Wilfong ignored the decision of the West Virginia Supreme Court of Appeals in Michael v. Michael, 196 W.Va. 155, 469 S.E.2d 14 (1996), a copy of which decision was filed with the Court, and she erroneously concluded that the Michael decision is not applicable in this case. In Michael, the Marion County Circuit Court (Honorable Fred Fox II) was upheld in its decision to reduce the fair market value of the subject business (Michael Machine Company, Inc.) by a 25% discount for lack of marketability of the 92% ownership interest of Mr. and Mrs. Michael in the subject business.

Judge Wilfong erred in her findings of fact that the 51% interest was purchased by "the parties" in 2001 (see the end of paragraph numbered 1 at the top of page 2 of the subject Family Court Order); that once the 51% interest was acquired by "the parties" "they" owned a 100% interest in the business (see the third full unnumbered paragraph on page 2 thereof); and that this particular business was managed by "the parties" and that the 51% gave "them" a 100% control (see the top of page 3 thereof). The evidence presented in this case is clear and is uncontroverted that David Gary Ware (not "the parties") purchased the 51% interest of John Geraffo in 2001 and that the subject business was managed by him (not by "the parties").



Judge Wilfong erred in increasing the value of the 51% interest by 5% instead of decreasing said value by at least 20%.

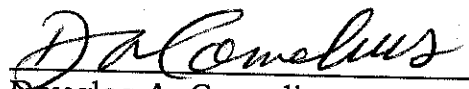
Based upon the previously stated errors, Judge Wilfong erred in awarding a judgment against David Ware in favor of Brenda Ware for the sum of \$92,373.75 for her alleged interest in the 51% interest in the Pizza Place of Bridgeport, Inc.

Based upon the testimony of Mickey G. Petitto, WVCGA License #065, who is a qualified and licensed appraiser of businesses, as well as of real estate, who performed an extensive investigation of the subject business, and who prepared a thorough written report, the appropriate value of the subject 51% interest in the subject business is \$27,800., of which Petitioner would be entitled to 50% thereof, being \$13,900., if this Court does not hold and conclude that in view of the language of the subject Antenuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Ayers (now Brenda Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to David Ware's interest in the subject business, including the 49% interest he already owned and the 51% interest he subsequently acquired from John Geraffo for the total purchase price of \$30,255., one-half of which purchase price would be \$15,127.50, if Brenda Ware is found to be entitled thereto.

In summary, the "Order Granting Petition For Appeal And Cross-Petition And Reversing And Remanding Case To Family Court" entered by the Circuit Court on March 22, 2007 correctly ruled on the validity and enforceability of

the subject "Ante-Nuptial Agreement"; and the "Order On Issues Remanded By Circuit Court" entered by the Family Court on July 3, 2007 correctly ruled on the remanded issues and should have been upheld. Although those two Orders are part of the Court record, copies thereof are attached hereto for the convenience of the Court. It is respectfully submitted that the Circuit Court erred in reversing in part the Family Court's July 3, 2007, "Order On Issues Remanded By Circuit Court", which Order should have been totally upheld, since it specifically followed the findings, conclusions and directives of the Circuit Court's March 22, 2007 first remand Order.

Respectfully submitted this 4<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Douglas A. Cornelius  
Attorney for Appellant  
P.O. Box 4424  
Clarksburg, WV 26302-4424  
304-622-3100  
WVSB #831

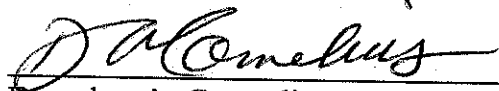
**CERTIFICATE OF SERVICE**

The undersigned attorney, Douglas A. Cornelius, hereby certifies that on May 4, 2009, service of a true copy of the following document/s: "**APPELLANT'S BRIEF**" was effected in the following manner:

- X   First Class Mail, postage prepaid to: Delby B. Pool  
       Certified Mail, return receipt requested  
       Hand Delivered to:  
       Facsimile Transmission to:  
       Other:

Upon the following person/s at the following address/es:

Delby B. Pool  
230 Court Street  
Clarksburg, WV 26301



Douglas A. Cornelius  
Attorney for Appellant  
P.O. Box 4424  
Clarksburg, WV 26302-4424  
304-622-3100  
WVSB# 831

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

IN RE THE MARRIAGE OF:

BRENDA DIANNE WARE,

Petitioner,

vs.

Civil Action No. 05-D-351-4  
Judge James A. Matish

DAVID GARY WARE,

Respondent.

**ORDER GRANTING PETITION FOR APPEAL AND CROSS PETITION, AND  
REVERSING AND REMANDING CASE TO FAMILY COURT**

Presently pending before the Court is a "Petition for Appeal from Family Court Final Order," filed by Respondent David Gary Ware, on November 22, 2006. Also pending before the Court is a "Response to Petition for Appeal and Cross Petition" filed by Petitioner Brenda Diane Ware on December 4, 2006.

This Court conducted a hearing on the matter on the 4<sup>th</sup> day of January, 2007. The Petitioner appeared in person and by her counsel, Delby B. Pool, and the Respondent appeared in person and by his counsel, Douglas A. Cornelius. The Court received arguments from both counsel at that time.

After conducting the aforementioned hearing, receiving arguments from both counsel, reviewing said Petition and Response, and conducting a thorough examination of the record, including the video transcript of the Family Court hearings in this matter, and pertinent legal authority, this Court concludes that the "Petition for Appeal" should be **GRANTED**, and the "Cross Petition" should be **GRANTED**, and the Final Order should be affirmed, in part, and reversed, in part, and remanded.

West Virginia Code § 51-2A-14(a) provides that "[t]he circuit court may refuse to consider the petition for appeal, may affirm or reverse the order, may affirm or reverse the order in part or may remand the case with instructions for further hearing before the family court judge." Additionally, "[t]he circuit court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard." W.Va. Code § 51-2A-14(b).

Petitioner and Respondent entered into an Antenuptial Agreement (hereinafter referred to as "Agreement") dated February 11, 1993. The validity of this Agreement has been in dispute since the commencement of this action in July 2005 and continues to be disputed between the parties as of late. Consequently, the Family Court held its first hearing on December 16, 2005, to determine the validity of the Agreement. By Order entered January 31, 2006, Special Family Court Judge Jaymie Godwin Wilfong set aside the Agreement as void and invalid for the following reasons: 1) Attorney Keith Skeen attempted to represent both parties, with Ms. Ware not having an opportunity to consult independent counsel and 2) there was no disclosure of the value of the assets and debts between the parties. A final hearing was then held on August 4, 2006 to resolve the remaining issues between the parties. The Decree of Divorce was entered on October 24, 2006, with incorporation by reference of the January 31, 2006 Order. It is from this Decree which both the Petitioner and Respondent appeal to this Court.

In his Petition, as grounds for appeal, Mr. Ware alleges: 1) the Family Court erred in finding and holding that the parties' Antenuptial Agreement is set aside as void and invalid and 2) the Family Court erred in finding that the marital value of the Pizza Place of Bridgeport is \$322,200.00 and that Brenda Diane Ware is entitled to 50% thereof.

In her Cross Petition, as grounds for appeal, Ms. Ware alleges: 1) the Family Court erred because it was without statutory authority to permanently bar her request from alimony in the future, 2) the Family Court erred by improperly declining to award any credit for payments made on the debt of a 1992 Chevrolet truck that Mr. Ware owned at the inception of the marriage and which was paid off during the marriage, 3) the Family Court erred in denying Ms. Ware's request for expert fees, and 4) the Family Court erred in denying Ms. Ware's request for attorney fees.

The Court finds that the Family Court Judge abused her discretion in ruling as a matter of law that the Antenuptial Agreement in this case is invalid due to Mr. Skeen's representation of both parties. The Court further finds that the Family Court Judge's finding that Ms. Ware was denied an opportunity to consult with independent counsel is clearly erroneous. As a general rule, when examining the validity of prenuptial agreements, the Supreme Court of Appeals of West Virginia has held,

"[p]renuptial agreements that establish property settlements and support obligations at the time of divorce are presumptively valid in West Virginia; the burden of proving the invalidity of such an agreement is upon the person would have the agreement held invalid."

Syl. Pt. 1, Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985).

The Court further held in Syl. Pt. 2, Gant v. Gant, 174 W.Va. 740, 329 S.E.2d 106 (1985),

"[t]he validity of a prenuptial agreement is dependent upon its valid procurement, which requires its having been executed voluntarily, with knowledge of its content and legal effect, under circumstance free of fraud, duress, or misrepresentation; however, although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress, or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent

advice of counsel is *not a prerequisite to enforceability* when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the *opportunity* to consult with independent counsel." (emphasis added)

The Court notes that while either or both parties may have a malpractice action against an attorney in this situation, it in no way rises to the level of voiding an agreement that was freely and voluntarily executed by the parties, without a finding of duress or coercion<sup>1</sup>. It was the undisputed testimony of the parties, as well as Mr. Skeen, at the hearing held on December 16, 2005, that Mr. Skeen was acquainted with both parties only through their employment at establishments located in the Meadowbrook Mall. Although Mr. Skeen testified that David Ware initially contacted him about preparing the Agreement, Mr. Ware and Mr. Skeen both testified that the two of them never met privately prior to their meeting, along with Ms. Ware, to review the Agreement on February 10, 1993. It is also undisputed that at the initial meeting, Brenda Ware objected to a provision in the Agreement which provided for a mutual waiver of alimony. The Agreement was then re-drafted by Mr. Skeen and signed by the parties the next day, February 11, 1993, in Mr. Skeen's office.

The Court notes that there have been no allegations presented that Ms. Ware made a request, at any time, to consult with another attorney and was told she could not do so. In fact, the Court feels that Ms. Ware's voiced objection to the provision addressing the waiver of alimony is indicative of her "knowledge of its content and legal effect," as set forth in Gant, *supra*. Moreover, the Court feels that the terms of the agreement were

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<sup>1</sup>The Court notes that the Family Court, in its January 31, 2006 Order, found that the evidence presented on the issue of duress was conflicting.

understandable and that Ms. Ware was a reasonably intelligent adult at the time she signed the Agreement. She testified that she was 22 years of age, could read and write, and was a high school graduate as well as a graduate of a two year program in x-ray technology. Additionally, Mr. Ware testified at the hearing held on December 16, 2005 that he and Ms. Ware had discussions about entering a prenuptial agreement for approximately two months prior to the execution of the antenuptial Agreement in this case.

Furthermore, attached to the Antenuptial Agreement are two certifications signed by Mr. Skeen and *both* of the parties which set forth Mr. Skeen's full advisement of *both* parties of their property rights, their respective acknowledgments of a full and complete understanding of the terms and provisions contained therein, and their voluntary execution of the Agreement in his presence. These certifications are identical and are signed by *both* of the parties.

In reaching its holding, the Court in Gant reasoned that general contract law governs prenuptial agreements and that it is clear that there is no requirement in general contract law that a party be advised by independent counsel before an agreement to which he or she sets his or her hand is enforceable. Id. at 745. The Court finds that under West Virginia law all that is required is the *opportunity* to consult with independent counsel and that Ms. Ware had that opportunity and for whatever reason chose not to utilize it. Therefore, the Court finds that the Family Court erred in ruling that the Antenuptial Agreement in this case is invalid because one attorney represented both parties and Ms. Ware had no opportunity to consult with independent counsel.



The Court also finds that the Family Court Judge abused her discretion in finding, as a matter of law, that the Antenuptial Agreement in this case is invalid due to the lack of financial disclosure between the parties at the time of the execution of the Agreement. "For a prenuptial agreement to be enforceable, it is not necessary that before the agreement was executed the parties meticulously disclosed to one another every detail of their financial affairs: it is sufficient if the party against whom the agreement is to be enforced had a general idea of the other party's financial condition and that there was no fraud or concealment that had the effect of inducing the party to be charged into entering an agreement that otherwise would not have been made. Syl. Pt. 2, Pajak v. Pajak, 182 W.Va. 28, 385 S.E. 2d 384 (1989).

Although Ms. Ware maintains she was unaware of all of Mr. Ware's assets at the time she entered into the Agreement, the Court finds that she had a general idea of Mr. Ware's financial condition. The parties had lived together for approximately 1 ½ years prior to the signing and had been paying bills jointly during that time period. More importantly, Ms. Ware knew that Mr. Ware's major asset was his interest in a business known as the Pizza Place of Bridgeport and that the only reason for the Antenuptial Agreement was to protect Mr. Ware's interest in that very business. There is no evidence that Mr. Ware concealed his assets from Ms. Ware or that he otherwise misled her as to what those assets were.

In Pajak, the Court held that the wife had sufficient knowledge of the husband's assets to validate an antenuptial agreement under which she waived any and all interests in his estate and which recited that it was entered into by each party with full knowledge as to the extent and probable value of the estate of the other. This exact language was

used in the instant Agreement in paragraph 8, page 6 wherein it states, "[i]t is AGREED that this agreement is entered into by each party with the full knowledge on the part of each as to the extent and probable value of the estate of the other." Therefore, the Court feels Ms. Ware had sufficient knowledge of Mr. Ware's assets and that the Family Court erred when it invalidated the Antenuptial Agreement based upon nondisclosure of assets.

Mr. Ware's second ground for appeal is that the Family Court erred in finding the marital value of the Pizza Place of Bridgeport to be \$322,200.00 and that Brenda Diane Ware is entitled to 50% thereof. Although Mr. Ware asserts in his Petition for Appeal and subsequent submissions to the Court that this ground shall be rendered moot upon the Court's finding that the Antenuptial Agreement is valid, the Court disagrees. In light of the Court's ruling above that the Antenuptial Agreement is valid, the Court remands this issue to the Family Court so that it may make a determination, upon examining the language employed in the Antenuptial Agreement<sup>2</sup>, as to the disposition of the assets addressed in the Agreement. This includes whether or not the 51% interest in the Pizza Place of Bridgeport, which was acquired during the marriage by Mr. Ware, is protected under the Agreement and whether or not Ms. Ware is entitled to any increase that may have occurred during the marriage in the 49% interest that Mr. Ware owned in the business prior to the marriage.

The Court will next address the grounds alleged by Petitioner in the Cross Petition. First, Petitioner alleges that the Family Court is without statutory authority to permanently bar her from requesting alimony in the future. However, counsel for Petitioner provides no

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<sup>2</sup> More specifically, the Court directs Judge Wilfong's attention to paragraph no. 2 on page 3, as well as paragraph nos. 4 and 6 on page 4.

legal authority in support of this argument. In the Divorce Decree entered October 24, 2006, Judge Wilfong clearly identified the distribution of the marital property as a factor in considering the claim to spousal support in this case.<sup>3</sup> Because the Court feels that its ruling regarding the validity of the Antenuptial Agreement could have a significant influence on Judge Wilfong's ruling on this issue, the Court remands this issue for further consideration by the Family Court.<sup>4</sup>

Second, Petitioner alleges that the Family Court erred in its denial of her request for credit for payments made on a 1992 Chevrolet truck owned by the Respondent. Petitioner argues that she should be given credit for the payments she made toward a total balance of \$12,468.24 during the marriage to extinguish the debt on said truck. The Family Court declined to award Ms. Ware any such credit, finding that both parties made payments on the truck and both parties also received a benefit from the use of the truck. Pursuant to W.Va. Code §48-1-233(2)(A), marital property includes the *amount of any increase in value in the separate property* of either of the parties to a marriage, which increase results from an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property... (emphasis added). In order to determine whether or not Ms. Ware is entitled to a credit for her payments made on the truck, evidence would need to be provided by her as to the value of the truck at the time of the

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<sup>3</sup>The Divorce Decree states, in Paragraph XIV, page 4, "[t]he distribution of marital property does affect the claim to spousal support because each of the parties will receive substantial assets, or the equivalent by monetary payment of equitable distribution."

<sup>4</sup> Because Judge Wilfong permanently barred Ms. Ware from requesting alimony in the future, the Court feels that Judge Wilfong must then address the interplay between W.Va. Code §§ 48-5-701, 48-6-201(b), and 48-8-101-105, and whether or not the request for rehabilitative alimony is permanently barred even where no award is made at the time of divorce.

marriage as well as its value at the time of divorce. However, this information was not provided by Ms. Ware below. Nevertheless, the Court remands this issue for further consideration by the Family Court in light of its forthcoming interpretation of the Antenuptial Agreement and the provisions contained therein.

As her third and fourth grounds for appeal, Petitioner alleges that the Family Court erred in its denial of her request for expert fees and attorney fees, respectively. The Court feels that the Family Court's decision on this issue may also be impacted by the ruling above on the validity of the Antenuptial Agreement and by the final equitable distribution award, if any. Therefore, the Court remands this issue to the Family Court for further consideration.

Accordingly, based upon all of the foregoing, it is ORDERED that the Petition for Appeal should be and the same is hereby GRANTED and the Divorce Decree should be and the same is hereby AFFIRMED, in part, as to the granting of the divorce, REVERSED, in part, and REMANDED to the Family Court for interpretation of the Antenuptial Agreement and the provisions set forth by the Court for consideration and for further consideration on the issues concerning any equitable distribution award, alimony award, award of expert fees and award of attorney fees.

It is further ORDERED, pursuant to Rule 35 of the WV Rules of Practice and Procedure for Family Court, that the Special Family Court Judge hold said hearing within 30 days of the entry of this Order.

It is further ORDERED that the Clerk of this Court shall send a certified copy of this ORDER to:

Delby B. Pool, Esquire  
230 Court Street  
Clarksburg, WV 26301

Douglas A. Cornelius, Esquire  
PO Box 4424  
Clarksburg, WV 26302-4424

The Hon. Jaymie Godwin Wilfong, Special Family Court Judge  
Family Court of Harrison County  
Randolph County Courthouse  
7 Randolph Avenue  
Elkins, WV 26241

ENTER: 03/22/2007

  
\_\_\_\_\_  
James A. Matish, Chief Judge

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 22 day of MARCH, 2007.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 26 day of MARCH, 2007.

Donald L. Kopp, II PA  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

IN THE FAMILY COURT OF HARRISON COUNTY, WEST VIRGINIA

In Re The Marriage Of:

BRENDA DIANNE WARE,

Petitioner,

and

Civil Action No. 05-D-351-4

DAVID GARY WARE,

Respondent.

**ORDER ON ISSUES REMANDED BY CIRCUIT COURT**

On March 22, 2007, the Circuit Court of Harrison County, (Chief Judge James A. Matish) entered an "Order Granting Petition For Appeal And Cross Petition, And Reversing And Remanding Case To Family Court." On April 18, 2007, this Court (Special Family Court Judge Jaymie Godwin Wilfong) conducted a hearing during which the parties' counsel presented arguments regarding the issues remanded to this Court.

Based upon the evidence presented at the December 16, 2005 hearing regarding the Ante-Nuptial Agreement, the evidence presented at the August 4, 2006 final divorce hearing, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law regarding the issues remanded to it.:

A. Regarding the Pizza Place of Bridgeport and the affect of the Ante-Nuptial Agreement thereon:

1. This Court is bound by and accepts the finding and conclusion of the Harrison County Circuit Court (Judge Matish) that the subject Ante-Nuptial Agreement is valid and is enforceable for the reasons stated in the subject Order reversing and remanding this case.

2. The specific language of said Ante-Nuptial Agreement supports a finding and conclusion that Petitioner Brenda Dianne Ware (formerly Brenda Dianne Ayers) waived, released and relinquished any and all rights which she could or might have, by reason of marriage, in and to the Pizza Place of Bridgeport business located at the Meadowbrook Mall in Bridgeport, West Virginia. This Court in paragraph 4 on page 2 of its "Order Regarding Antenuptial Agreement", specifically found that although paragraph 2 of said Ante-Nuptial Agreement used the word "franchise" and that there was no "franchise", "the parties were aware of what was the subject matter in that paragraph." On sheet 20, page 77 of the transcript of the December 16, 2005 hearing, this Court stated: "In fact, there was no franchise. But the Court finds that there was a meeting of the minds. Everybody knew what the parties were talking about." Judge Matish also specifically found in the second paragraph on page 6 of his Order that "Ms. Ware knew that Mr. Ware's major asset was his interest in a business known as the Pizza Place of Bridgeport and that the only reason for the Antenuptial Agreement was to protect Mr. Ware's interest in that very business."

3. In addition to directing this Court to the specific language contained in paragraph 2 on page 3 of the subject Ante-Nuptial Agreement, Judge Matish further directed this Court's attention to paragraph numbers 4 and 6 on page 4 thereof. Paragraph number 4 clearly and specifically provides that each party "shall respectively own all personal property which each respectively now owns or may hereafter acquire free from any claim on the part of the other spouse . . . (emphasis supplied)". Paragraph number 6 clearly and specifically provides that each party releases "all rights, which, by reason of their marriage, each may acquire in the property or estate of the other."



4. In view of the validity of the subject Ante-Nuptial Agreement and the specific language contained in paragraphs 2, 4 and 6 thereof, Brenda Dianne Ayers (now Brenda Dianne Ware) waived, released and relinquished any and all rights to which she might have been entitled by reason of marriage in and to Mr. Ware's interest in the Pizza Place of Bridgeport business, including the interest he already owned and the interest he subsequently acquired from John Geraffo.

B. Regarding the 1992 Chevrolet truck and the loan payments made thereon during the marriage:

Petitioner had the burden of proving that the value of Mr. Ware's pre-marital truck increased during the marriage by either expending marital funds to pay down debt against it or by performing work on it during the marriage and by proving the amount of any increase in value. It is generally true that motor vehicles depreciate in value as fast or faster than a motor vehicle loan thereon is paid off. Petitioner failed to introduce any evidence at the final hearing which could support a finding that the value of said truck increased during the parties' marriage. No evidence was introduced by her as to the value of said truck or as to the principal debt due on said truck loan as of the date of the parties' marriage (February 20, 1993) or as of the date of the parties' separation (August 25, 2005). Further, no evidence was introduced by her that any marital funds were used to restore said truck to its original condition or to otherwise increase its ever depreciating value during the 12-1/2 year period from date of marriage to date of separation.

C. Regarding the Petitioner's rehabilitative spousal support request:

At the final hearing, Petitioner requested rehabilitative spousal support in the amount of \$1,200. per month for three years. In addition to this Court's reasons for denying said request as set forth in paragraph XIV on pages 3, 4 and 5 of the Decree Of Divorce, an award of

rehabilitative spousal support is not merited in view of the specific language of Section 48-8-105(a) of the West Virginia Code, which states: "The Court may award rehabilitative spousal support for a limited period of time to allow the recipient spouse, through reasonable efforts, to become gainfully employed (emphasis supplied)." At the time of the final hearing, Petitioner was already gainfully employed with a gross monthly income of \$3,100. per month. In addition to her already being gainfully employed, Petitioner failed to provide any specific testimony as to the actual cost of any training or as to the length of any training.

D. Regarding Petitioner's request for an award of attorney fees and expert witness fees:

This Court previously ruled in paragraph L. on page 21 of the Decree of Divorce that each party shall pay his or her own attorney fees and costs incurred in the divorce action, and this Court still finds said ruling to be appropriate. Each party has good income and good income earning ability. This Court awarded the divorce based upon the ground of irreconcilable differences, and, although marital fault was alleged against both parties (adultery against Petitioner and cruelty against Respondent), this Court did not find sufficient proof of any fault ground to grant a divorce thereon. Both parties were awarded substantial assets in equitable distribution, and Respondent has already made an equalizing cash payment to Petitioner in the amount of \$39,581.62, and he has refinanced the marital home loan to remove Petitioner from any liability on their previous marital home loan. Petitioner previously withdrew \$7,000. from the parties' joint bank account, of which amount, she paid her attorney a retainer of \$6,000. Each party incurred substantial attorney fees and expenses and expert witness fees and expenses, and after considering all relevant facts, this Court believes that each party should be responsible for the payment of his and her own respective costs of this litigation.

WHEREFORE, it is ORDERED as follows:

1. Based upon the findings and conclusions contained in paragraph A. on pages 1-3 hereof, Petitioner is not entitled to any of the value of the Pizza Place Of Bridgeport business entity, and her request for a portion of said value is denied.

2. Based upon the findings and conclusions contained in paragraph B. on page 3 hereof, Petitioner is not entitled to any credit for the truck loan payments made on Respondent's pre-marital 1992 truck during the parties' marriage to separation time period, and her request for a portion of an alleged increased value thereof during said time period is denied.

3. Based upon the findings and conclusions contained in paragraph C. on pages 3-4 hereof, Petitioner's request for rehabilitative spousal support is denied.

4. Based upon the findings and conclusions contained in paragraph D. on page 4 hereof, Petitioner's request for an award of attorney fees and expenses and expert witness fees and expenses is denied.

5. Pursuant to Rule 22 (c) of the Rules Of Practice And Procedure For Family Court, the parties are hereby informed as follows:

(1) This is a final Order;

(2) Any party aggrieved by this final Order may take an appeal either to the Circuit Court of this County or directly to the Supreme Court Of Appeals of West Virginia;

(3) A Petition For Appeal to the Circuit Court may be filed by either party within thirty days after the entry of this final Order; and

(4) In order to appeal directly to the Supreme Court Of Appeals, both parties must file, within fourteen days after the entry of this final Order, a joint notice of their intent to appeal directly to the Supreme Court and a waiver of their right to appeal to the Circuit Court.

6. The Clerk shall mail certified copies hereof to : Douglas A. Cornelius, P.O. Box 4424, Clarksburg, WV 26302-4424; and Delby B. Pool, 230 Court Street, Clarksburg, WV 26301.

Enter: July 3, 2007  
Delby B. Pool  
Judge

Prepared and Submitted By:

D A Cornelius

Douglas A. Cornelius

Counsel for Respondent

P.O. Box 4424

Clarksburg, WV 26302-4424

304-622-3100

WVSB #831

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action

on the 3 day of July, 2007.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 9 day of July, 2007.

Donald L. Kopp, II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia